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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/033,387	12/26/2001	Gershon Levitsky	4026-4005US1	9999

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MORGAN & FINNEGAN, L.L.P.
345 Park Avenue
New York, NY 10154-0053

EXAMINER

DAWSON, GLENN K

ART UNIT	PAPER NUMBER
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3761

10

DATE MAILED: 05/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/033,387

Applicant(s)

LEVITSKY ET AL.

Examiner

Glenn K Dawson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 February 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 29-36, 39-48 and 51-60 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 29, 30, 33-36, 39-42, 45-48, 51, 52, 56, 60 is/are rejected.
- 7) ☒ Claim(s) 31, 32, 43, 44, 53-55 and 57-59 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

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Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 29,30,39-42,51,52,56 and 60 are rejected under 35 U.S.C. 102(b) as being anticipated by Derrick-5046491.

Derrick discloses a device and method of use including a cannula having a tube 68 for capturing oral exhalation gases, a tube 28 for capturing nasal exhaled gases and a porous tube in the shape of a v as shown in fig. 3 connected to inhalant gases which delivers gases to a region between the nose and mouth of the user, and a tube having nares for introduction into the nostrils of the user and connected to tubes 28 for capturing and delivering the nasal exhaled air to the gas analysis apparatus. .

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.

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2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 33-36 and 45-48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Derrick-'491 in view of Dickerman, et al.-5113857.

Derrick discloses the invention as claimed with the exception of the filter in one of the inlets. Dickerman discloses that it was known to provide filters in the oxygen delivery line. It would have been obvious to place a filter in the oxygen delivery line in order to ensure breathing gas free from contaminants. The specific placement in the inlet identified at 18 in fig. 4 would have been obvious given it is in the oxygen delivery line and prior to any oxygen outlet orifice.

Allowable Subject Matter

Claims 31,32,43,44,49,50,53-55 and 57-59 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments filed 02-27-04 have been fully considered but they are not persuasive.

The examiner respectfully disagrees with applicant's characterization of the fig. 3 embodiment of Derrick. Cannula 18 has two end portions 24,26 open to permit fluid communication with a pair of nasal exhaled gas conduits 28. The examiner believes that the outline tube at the top edge of the cannula (actually the top edge of both sides of the cannula have a tube outline) is indeed the ends of the two conduits 28 communicating

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with the two ends of cannula 24 and 26. As shown in fig.1 and 2, an unidentified tube connected to the end of the v-shaped member must be connected to the inhalant gases source. The ends of oral gas conduits 68 either go through part of the v-shaped member, exit therefrom and connect to ends of the tubular member 60 or go behind the v-shaped member and connect to ends of the tube 60 for collecting oral exhaled gases. No septum is disclosed with respect to the cannula of fig. 3 like element 90 which is found in fig. 4 whereby gas is delivered to only one of the nares. Therefore, in fig. 3, exhaled nasal gases are delivered through both nares and are received by ends of the nasal exhaled gas conduits 28; and exhaled oral gases are received through holes 62 in tube 60 and are received by ends of the oral exhaled gas conduits 68. Inhalant gases are delivered through unnumbered tube into the left side of v-shaped tube and are delivered to the area between the nose and mouth of the user by being expelled through the apertures in the v-shaped tube. At least claims 2-6 of Derrick support this characterization of fig. 23 of Derrick.

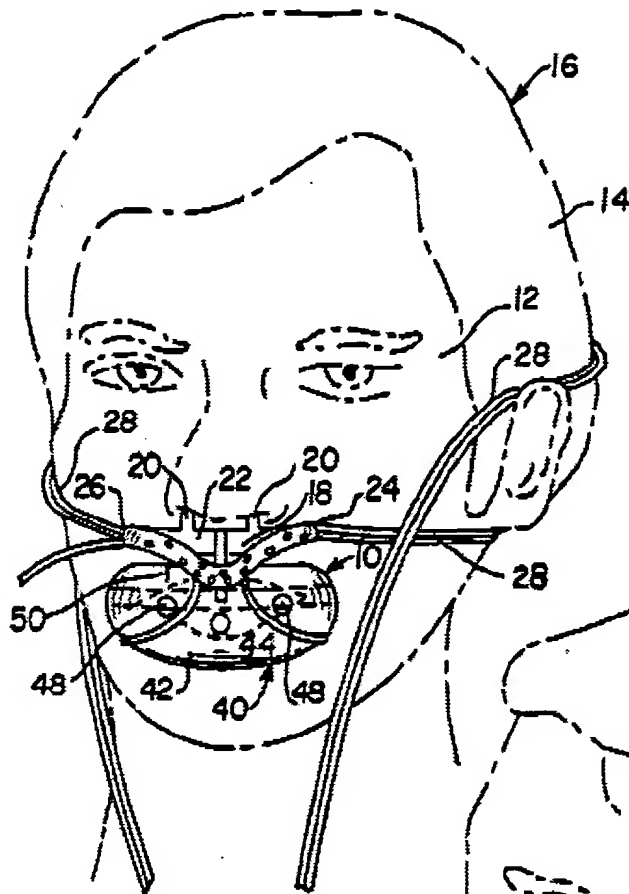


FIG. 1

Inhalant
gases
delivery
conduit

62

40

60

FIG. 2

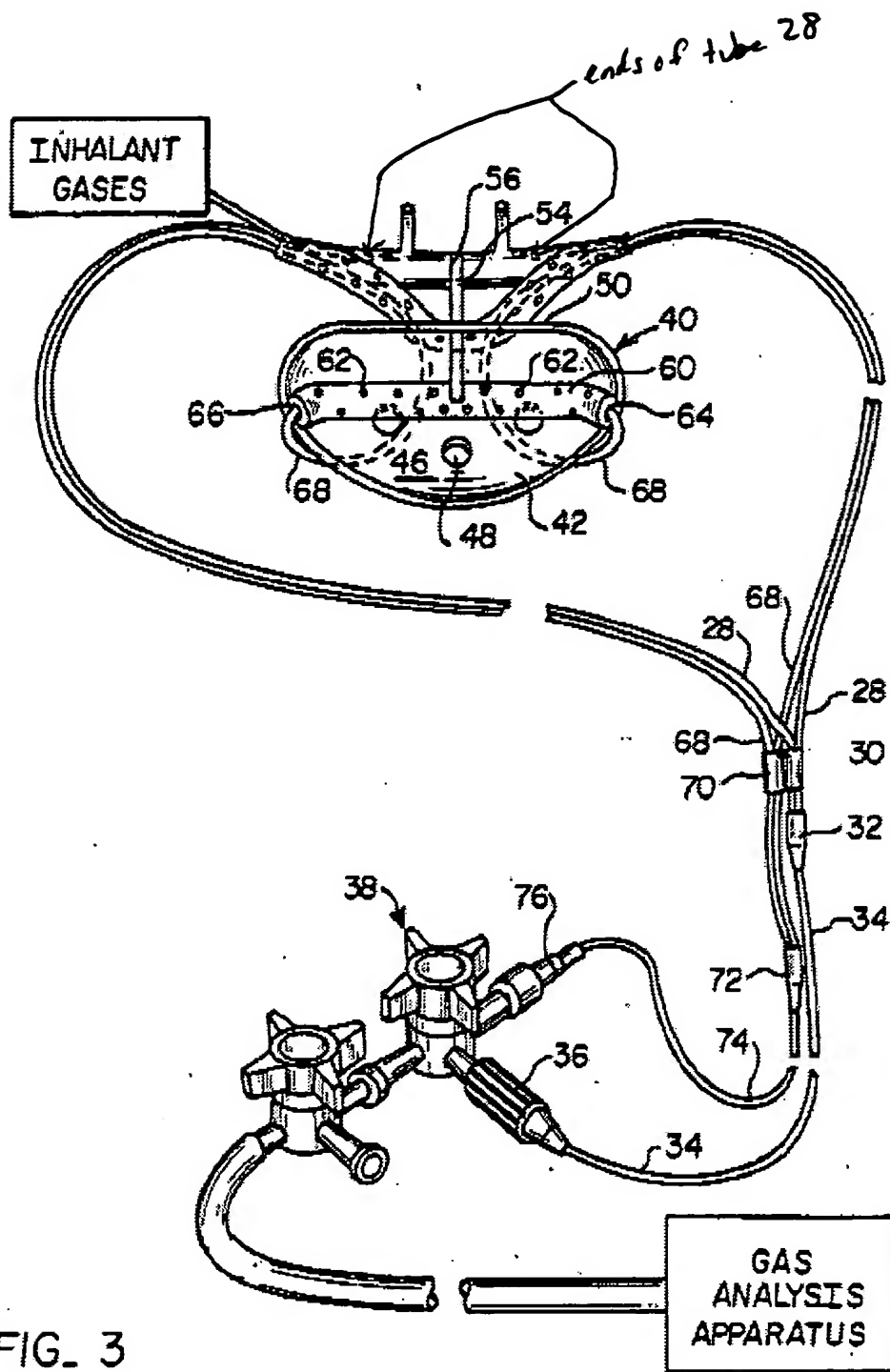


FIG. 3

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn K Dawson whose telephone number is 703-308-4304. The examiner can normally be reached on M-Th 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael J. Milano can be reached on 703-308-2496. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Glenn K Dawson
Primary Examiner
Art Unit 3761

Gkd
04 May 2004